DATE: JUNE 7, 1996

CASE NO: 94-INA-407

In the Matter of

STEVEN YANG
Employer

on behalf of

HSIEH F. CHANG
Alien

Before: Jarvis, Vittone and Wood
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Steven Yang's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage

and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On December 3, 1992, Employer filed a Form ETA 750 Application For Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Hsieh F. Chang. The job opportunity was listed as Tutor (Education). The job required two years of college with a major in Liberal Arts or Music and two years experience in the job or the related occupation of teaching. The application also contained special requirements which required that an applicant be "Able to speak, read and write Chinese (Mandarin). Possess knowledge of basic music theory and practice; able to perform piano accompaniment."

The job duties were described as:

> Teach academic subjects including Chinese language & literatures, Chinese history and music. Specifically, teach 9 & 3-year olds Chinese language and music; teach the 9-year-old Chinese history and literatures including short stories and poems. Design curricula for language ability development (reading and writing) and music sensitivity and capability of both singing and instrument playing (piano). Prepare, assign and tutoring homework. AF 70.

In the application the Employer listed along with the job title the DOT occupation code 099.227-034 and this was the code assigned by EDD. Id. One applicant, Amy X. Smith, responded to Employer's recruitment effort and was not hired because of "lack of required capability of teaching music. . . ." AF 79. The file was then transmitted to the CO. AF 69.

The CO issued a Notice of Findings ("NOF") on June 15, 1993, which proposed to deny the application. AF 55. The CO questioned whether Employer was a non-existent business or there was a non-existent job opening. AF 56. The CO found that there appeared to be an unduly restrictive combination of duties in violation of §656.21(b)(2)(i)(A) because Employer combined the requirement for expertise in teaching a specific musical instrument, the piano, and singing along with the requirement for

the ability to teach Chinese language, history and literature. AF 57. The CO found that Employer had improperly combined the duties of a tutor (DOT 099.227-034) and music instructor (DOT 152.021-010). Id. The NOF required Employer to establish that the combination of duties was normal or customary or that the combination rested on business necessity or to delete the music requirement and retest the labor market. AF 58. The CO also required Employer to rebut that applicant Amy X. Smith was rejected for an unlawful reason. AF 60.

Employer submitted a timely rebuttal. AF 21. The CO found it to be unpersuasive. On February 9, 1994 he issued a Final Determination ("FD") which denied certification. AF 11. The CO found that Employer failed to rebut that: A bona fide job existed. AF 13. There are no unduly restrictive requirements or combination of duties for the job. AF 13-14. The U.S. worker was rejected for a lawful job-related reason. AF 14. Employer filed a request for administrative judicial review on March 7, 1994. AF 1.

Discussion

As indicated, the CO found that Employer had failed to establish that there are no unduly restrictive requirements. Employer contends that: He is not combining duties from two different occupations. Music is an academic subject that falls within the job duties defined in the occupation of tutor (education) set forth in DOT 099.227-034. The CO is attempting to challenge the job description in the DOT which is contrary to law and the decisions of this Board. AF 3-5.

DOT 099.227-034 describes the duties of Tutor (education) as:

> Teaches academic subjects, such as English, mathematics, and foreign languages to pupils requiring private instruction, adapting curriculum to meet individual's needs. May teach in pupil's home.

Employer argues that the enumeration of academic subjects is illustrative only because it is preceded by the words "such as"; any combination of academic subjects is permissible under the description; that music is an academic subject and that since the job meets the DOT description, there are no unduly restrictive requirements.

Employer submitted as part of his rebuttal to the NOF letters from three professors of music at California State University, Northridge. Professor Jerry D. Leudders, Chair of the Music Department, stated that music was an academic subject and had the same level of importance as subjects such as English,

mathematics, physics and chemistry. AF 48-49. Professor Charles Fierro stated that music is an academic field of study at almost all major colleges and universities in the United States. AF 50. Professor Frank F. McGinnis stated:

> Music is indeed an academic subject, attested to by the hundreds of public and private universities in the U.S. which offer B.A., B.M., M.A. and Ph.D. curricula and degrees with music as the major field. This would include all state universities and countless private institutions such as Harvard, Yale, Stanford, etc. Historically one can point to the "Quadrivium," consisting of arithmetic, music, geometry and astronomy, which constituted the academic basis for the great European universities from their founding in the Middle Ages.
>
> Private tutorial teaching in the home or studio is every bit as academic as it would be under the rubric of the university. Many highschools and colleges grant academic credit for such private instruction. AF 51.

In the NOF the CO found that under §656.21(b)(2)(i)(A) the job requirements "Shall be those normally required of the job in the United States." AF 57. The CO also found under §656.21(b)(2)(ii) that if the job involved a combination of duties the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment and/or the combination job opportunity is based on a business necessity. Id. The CO found that Employer had combined the duties of a Tutor (DOT 099.227-034) and that of music instructor (DOT 152.021-010). Id. He stated that:

> A tutor teaches "academic subjects, such as English, mathematics, and foreign languages." A music instructor teaches specific instruments or vocal music. Id.
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> Academic is defined as:
>
> 2a. relating to studies that are liberal or classical . . . . The American Heritage College Dictionary, 3rd Ed. (1993), p. 7; Cf. O'Connor v. Peru State College, 781 F.2d 632, 642 (8th Cir. 1986).
>
> Liberal arts are defined as:
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> 1. Academic disciplines such as languages, literature, history, philosophy, mathematics and science that provide information of general cultural concern. Id at p. 781.

The letters from the three music professors submitted by Employer with his rebuttal establish that music is an academic subject. However, this is not determinative of the case. There are a myriad of academic subjects which have a plethora of specific courses thereunder. We take judicial notice that the 1996 Catalogs of Stanford University and the University of California contain numerous courses in the following academic subjects in addition to those enumerated in DOT 099.227-034: Anthropology, classics, history, biology, botany, economics, linguistics, geology, physics, literature, political science, geography, art, music, chemistry, ethics, philosophy, international relations, psychology, religious studies, sociology, genetics, environmental science, rhetoric, medieval studies, statistics, archaeology, astronomy, zoology.

Employer's position is that a job description for a tutor which contains any eclectic combination of academic subjects cannot be challenged by the CO because the description falls under the duties set forth in DOT 099.227-034. This is not correct. Even though the job description meets the DOT description of duties, where that description is a general one, such as "academic subjects", the CO may require that the combination of specific subjects are "those normally required for the job in the United States." §656.21(b)(2)(i)(A).

The regulations command that the employer document business necessity unless the job requirements are: A. Those normally required for the job in the United States. B. Those defined for the job in the DOT. C. Those which do not include the requirement for a foreign language. §656.21(b)(2)(i). The three requirements are not alternate ones; they are cumulative. They have been found to be reasonable. Kwan v. Donovan, 777 F.2d 479 (9th Cir. 1985).

The CO found that teaching Chinese language and literature combined with piano proficiency and teaching music and singing were not requirements normally required for the job of tutor in the United States. AF 57. The CO also found that Teacher, music was a separate job description in the DOT (152.021-010). Id.

We have already held that music is an academic subject which would fit the broad definition contained in DOT 099.227-034. However, it was still necessary for Employer to rebut that requiring piano proficiency and teaching music along with Chinese language and literature were duties normally required of tutors in the United States. The letters by Professors Luedders and Fierro deal only with the question of whether music is an academic subject and are not relevant on this point. Professor McGuinnis' letter states that:

> Historically one can point to the "Quadrivium," consisting of arithmetic, music, geometry and astronomy, which constituted the academic basis for the great European universities from their founding in the Middle Ages. AF 51.

The practices of universities in the Middle Ages shed no light on duties normally required of tutors in the United States in the 1990s.

We find that Employer failed to rebut the CO's finding that the job requirements are not those normally required for the job in the United States. AF 57. The denial of certification is sustainable on this ground. In the light of this determination, it is unnecessary to consider the other issues raised by the Employer.

ORDER

The Final Determination of the Certifying Officer is affirmed and labor certification is denied.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/bg

Judge Pamela Lakes Wood, concurring.

Although I agree with the denial of labor certification, I write separately because my analysis of the issues differs from that of the majority.

Unlike the majority, I agree generally with the Employer's position, as paraphrased by the majority, "that a job description for a tutor which contains any eclectic combination of academic subjects cannot be challenged by the CO because the description falls under the duties set forth in DOT 099.227-034 [the occupation code for Tutor]." **See generally Drs. Patricia Preisig and Robert Alpern**, 90-INA-35 (Oct. 17, 1990). In this regard, there is no requirement for a showing of business necessity if the duties for the position fall within the same heading under

the **Dictionary of Occupational Titles** ("DOT"). **Minuteman Press**, 93-INA-15 (March 25, 1994); **Alan Bergman Photography**, 88-INA-404 (Sept. 28, 1989); **Gulliver Preparatory School**, 87-INA-549 (Aug. 17, 1988). In **Gulliver Preparatory School**, the CO denied labor certification for a teacher on the basis that the combination of teaching biology and mathematics and soccer coaching was not customary, but the panel reversed because the combination of duties was listed in the DOT in the secondary teacher's job description so the combined requirements were not restrictive. By analogy, the combination of teaching various academic subjects here falls within the purview of the tutor job description and is not restrictive.

This does not end the matter, however, as the Employer has added a special requirement of ability to perform piano accompaniment but has failed either to show that this is a normal requirement for a job teaching music as an academic subject in the United States or to make a showing of business necessity for this requirement. In the letter from the Employer, the ability to play the piano was not even mentioned (AF 87-88), and the letters from Professors Luedders, Fierro, and McGuinnis do not provide the lacking documentation (AF 48-51).

Accordingly, I agree that labor certification should have been denied and the CO's denial of labor certification should be affirmed.